

June 11, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re:

JOSE LUIS CARLOS MARTINEZ,

Movant.No. 08-2096
(D.C. No. 1:07-cv-00152-WJ-RHS)
(D. N.M.)

ORDER

Before **KELLY, O'BRIEN**, and **HOLMES**, Circuit Judges.

Jose Martinez seeks authorization to file a fourth petition for habeas relief under 28 U.S.C. § 2254. His first petition ended without a ruling on the merits when the district court granted his motion to dismiss. *Martinez v. Lytle*, No. 98-cv-593- BB-LFG (D. N.M. Feb. 11, 1999). His second petition was denied on the merits, *Martinez v. Tafoya*, No. 99-cv-672-LH-LCS (D. N.M. Oct. 11, 2000), and we denied a certificate of appealability, *Martinez v. Tafoya*, No. 00-2445 (10th Cir. July 17, 2001). Mr. Martinez filed a third § 2254 petition, but after the district court transferred the matter here, we denied authorization. *Martinez v. Lemaster*, No. 04-2221 (10th Cir. Nov. 3, 2004). Now in his fourth petition, Mr. Martinez claims his trial counsel was ineffective in failing to call potentially exculpatory witnesses and misadvising him during plea negotiations.

He urges us to authorize this petition because his convictions for kidnapping and sexual penetration were procured with false accusations.

To obtain authorization to file a second or successive § 2254 petition, Mr. Martinez must show that his claims were not raised in a prior petition, 28 U.S.C. § 2244(b)(1), and are based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, *id.* § 2244(b)(2)(A), or on facts previously undiscoverable through the exercise of due diligence that would establish by clear and convincing evidence that he was not guilty of the offenses for which he was convicted, *id.* § 2244(b)(2)(B).

Mr. Martinez concedes his claims were raised in a prior habeas petition and rely on neither new law nor new facts. We particularly note that his contention that he was misadvised during plea negotiations does not satisfy the criteria of 28 U.S.C. § 2244(b)(2). Accordingly, the motion for authorization is DENIED. This denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk